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No. 05-746

IN THE

# Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
*Petitioner,*

v.

TIMOTHY SORRELL,
*Respondent.*

On Petition for Writ of Certiorari to the
Missouri Court of Appeals

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court below erred in sustaining the use of a jury instruction that retained, under the Federal Employers' Liability Act ("FELA"), the traditional common-law causation standard for an employee's contributory negligence.

2. Whether this Court should grant review of a question not presented to the court of last resort below and compel FELA trial courts to use special verdict forms, despite the lack of authority—from this Court, lower courts, FELA's text, or the Constitution—requiring special verdicts.

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## RESPONDENT'S BRIEF IN OPPOSITION

Petitioner Norfolk Southern Railway Company asks this Court to review a nonprecedential, unpublished memorandum decision from the Missouri Court of Appeals, which affirmed that the traditional common-law causation standard, embodied in the Missouri Approved Instructions, applies to a plaintiff's contributory negligence under the Federal Employers' Liability Act (FELA), whereas a liberalized causation standard applies to the FELA defendant's primary negligence. Petitioner also asks this Court to demand that FELA juries use special verdict forms rather than general verdict forms.

The first question presented is based on scant and stale case law and addresses an issue that is legally insignificant and will not affect the outcome of this case. The second question presented, which petitioner failed to preserve for review, amounts to an immoderate request that this Court federalize FELA jury verdict forms, for which petitioner offers no statutory or constitutional basis. Neither question merits this Court's attention.

## STATEMENT

FELA protects railroad workers by broadening beyond the common law the legal remedies available to redress injuries caused by their employers' negligence. This Court has held that FELA's purpose and plain language expand employers' liability beyond principles of common-law causation to hold railroads or employers liable for injuries caused "in whole or in part" by their negligence. *See Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 507-08 (1957) (interpreting 45 U.S.C. § 51). FELA also includes a comparative negligence provision under which employees' recoveries are reduced rather than completely barred by their own negligence. 45 U.S.C. § 53; *see Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 62-63 (1943). However, section 53's provision on comparative negligence does not specify that the plaintiff's comparative negligence is also judged by

the relaxed "in whole or in part" causation standard applied to the defendant's primary negligence in section 51. Accordingly, different causation standards apply to plaintiff's and defendant's negligence in FELA actions: The defendant is subject to a more relaxed causation standard, but the plaintiff is subject only to the traditional common-law standard.

This case centers on an encounter between two trucks driven by two of petitioner Norfolk Southern's employees. The factual accounts presented at trial are starkly divergent. According to respondent Timothy Sorrell, his truck was forced off the road into a ditch by Norfolk Southern employee Keith Woodin's truck as it passed him from the opposite direction. But according to Woodin, Sorrell carelessly pulled too far over to the side of the road when the trucks were still 400-500 feet apart, causing Sorrel's truck to roll over. As petitioner aptly summarizes: "Simply put, Sorrell claimed that Woodin forced him off the road and Woodin testified that Sorrell drove himself into a ditch." Pet. 4.

Sorrell brought suit under FELA seeking damages for his injuries, and the case was tried to a jury. Norfolk Southern argued that Sorrell had been contributorily negligent and requested that the jury be instructed that the causation standards are identical for both plaintiff's and defendant's negligence. The trial court instructed the jury instead that it must find that the defendant's negligence contributed "in whole or in part" to the plaintiff's injury, as stated in 45 U.S.C. § 51, but that any contributory negligence by the plaintiff "directly contributed" to his injury. Pet. App. 36a.

The railroad also requested a special verdict form specifying whether, and in what proportion, the jury had found Sorrell contributorily negligent. The trial court declined and instead used a general verdict form. Pet. App. 36a-37a. The jury returned a verdict for Sorrell, Pet. App. 26a, and the railroad satisfied the judgment in full.

On appeal, the Missouri Court of Appeals affirmed the judgment, holding that both the jury instruction and use of the general verdict form were lawful. The Missouri Supreme Court denied discretionary review.

## REASONS FOR DENYING THE WRIT

### I. The First Question Presented Is Unimportant, Identifies No Violation of Federal Law, and Will Not Affect the Outcome of This Case.

#### A. The Question Presented Is Insignificant.

The supposedly urgent controversy petitioner seeks to bring to this Court's attention is based on a smattering of mostly decades-old opinions in general agreement with each other. *See* Pet. 13-14 (citing *Fashauer* v. *New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1281-82 (3d Cir. 1995); *Dixon* v. *Penn Cent. Co.*, 481 F.2d 833, 835 (6th Cir. 1973); *Ganotis* v. *New York Cent. R. Co.*, 342 F.2d 767, 768-69 (6th Cir. 1965); *Page* v. *St. Louis S.W. Ry.*, 349 F.2d 820, 823 (5th Cir. 1965); *Caplinger* v. *N. Pac. Terminal*, 418 P.2d 34, 35-36 (Or. 1966)). Far from evidencing an issue of "imperative" importance, *see* Pet. 15, that this issue surfaces in the case law once every decade or two is more correctly seen as an indication of its inconsequential weight. Further, the standards have thus far had an uneventful twenty-eight-year-long tenure in Missouri. *See* Norfolk Southern Apl. Br. 29 (noting that the standards diverged in 1978). But evidence of the matter's insignificance need not be limited to the timeline: The cases themselves acknowledge that there is little practical import. *See Page*, 349 F.2d at 823 ("At the outset, there is the doubt that such casuistries have any practical significance as the jury, undergoing its once in-a-lifetime exposure to the equivalent of a law school lecture, seeks to translate instruction into definitive answers . . . ."); *Caplinger*, 418 P.2d at 36 ("It is not exactly clear what real

difference the double standard instruction would make in the trial of a Federal Employers' Liability Act case.").[1]

Even if differing causation standards might be significant in some cases, the facts of Sorrell's case render any such difference irrelevant, making this case a poor vehicle for examining the questions presented. As petitioner itself notes, at trial, Sorrell and the railroad gave starkly divergent accounts of the events: Sorrell said that Woodin forced him off the road; Woodin said that Sorrell drove himself into a ditch. *See* Pet. 4. Under *either* measure of causation—contributed "in whole or in part" or "directly contributed"—the jury was forced to side entirely with Sorrell or entirely with Woodin based on the facts before it. There was little room under either side's version of the facts to allow for its own negligence, regardless of the causation standard used.

### B. The Missouri Court of Appeals' Approval of Jury Instructions Applying Different Causation Standards to Primary and Contributory Negligence is Consistent with FELA and This Court's Precedents.

The Missouri Court of Appeals' decision is consistent with all decisions of this Court and the plain language of FELA. Although this Court has held that a relaxed causation

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[1] Petitioner also cites pattern jury instructions from several circuits supporting its view of FELA causation. *See* Pet. 14. Pattern jury instructions are not binding precedent and so are not properly considered part of a federal circuit conflict: "[Model] [j]ury instructions [are] not blessed with any special precedential or binding authority." *McDowell v. Calderon*, 130 F.3d 833, 840 (9th Cir. 1997) (en banc). Model jury instructions are "not a substitute for the individual research and drafting that may be required in a particular case." *Ninth Circuit Manual of Model Civil Jury Instructions*, Introduction (citing *McDowell*); *see also United States v. Norton*, 846 F.2d 521, 525 (8th Cir. 1988) ("The Model Instructions . . . are not binding on the district courts of this circuit, but are merely helpful suggestions to assist the district courts.").

standard, rather than the traditional common-law standard, applies to defendants under 45 U.S.C. § 51, *see Rogers*, 352 U.S. at 507-08, it has never said that the same causation standard applies to FELA plaintiffs' contributory negligence under 45 U.S.C. § 53. Rather, this Court's FELA jurisprudence demonstrates that the plaintiff's contributory negligence causation standard remains that of traditional common law.

As this Court has consistently held, FELA's purpose is to protect railroad employees from the harshness of the traditional common law. See *Rogers*, 352 U.S. at 507 ("[FELA] was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant."); *see also Norfolk & W. Ry. Co.* v. *Ayers*, 538 U.S. 135, 145 (2003) ("Congress designed the FELA to shif[t] part of the human overhead of doing business from employees to their employers.") (internal quotations omitted). All FELA provisions—particularly those that abrogate traditional common-law defenses—are interpreted with this employee-protective purpose in mind, but "[o]nly to the extent of these explicit statutory alterations . . . is [the] FELA an avowed departure from the rules of the common law." *Id.* at 145 (internal quotations omitted); *accord Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994).

Thus, in *Rogers*, the Court held that FELA section 51 explicitly abrogates the employer's traditional common-law causation standard for the employer's primary negligence through its use of the words "in whole or in part," a result consistent with FELA's worker-protective purpose. *See Rogers*, 352 U.S. at 506-10. But neither the purpose nor plain language of FELA section 53 demands the same conclusion for the employee's contributory negligence. On the contrary, that section 53 contains no language about the employee's causation standard compels the conclusion that in the absence of "explicit statutory alterations," the default

common-law standard applies. *See Norfolk*, 538 U.S. at 145.[2]

Petitioners cite several of this Court's pre-*Rogers* cases in an attempt to demonstrate that unequal causation standards are incompatible with FELA. *See* Pet. 9-11 (citing *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430 (1949); *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943); *Illinois Cent. R.R.* v. *Skaggs*, 240 U.S. 66 (1916); *Seaboard Air Line Ry.* v. *Tilghman*, 237 U.S. 499 (1915); *Grand Trunk W. Ry.* v. *Lindsay*, 233 U.S. 42 (1914); *Norfolk & W. Ry. Co.* v. *Earnest*, 229 U.S. 114 (1913)). But those early decisions merely restate the general principle that FELA abrogates the contributory negligence bar and substitutes proportional comparative fault for the harsh common-law rule. The cases say nothing about whether the causation standard for plaintiffs is different from the standard for defendants. Indeed, the cases cited by petitioner are necessarily irrelevant to the question presented, because they were all decided before *Rogers* definitively established that the defendant's causation standard was not the traditional common-law measure, but rather the relaxed "in whole or in part" causation standard. Inexplicably, petitioner does not cite, let alone discuss, *Rogers*—an omission that enfeebles its entire discussion of FELA's causation standards.

To be sure, the few lower federal courts and state courts to have considered the issue mostly agree, albeit generally with little analysis, that the employer's and employee's causation standards should be the same. However, despite petitioner's claim to the contrary, *see* Pet. 8, Missouri is not alone in holding that different standards of causation apply to a railroad defendant's primary negligence and a plaintiff

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[2] The Missouri instruction requiring that the plaintiff's negligence "directly contribute" to his injury reflects the common-law proximate cause standard. *See Snyder* v. *Chicago Rock Island & Pac. R.R. Co.*, 521 S.W.2d 161, 165 (Mo. Ct. App. 1973).

employee's contributory negligence. *See Missouri-Kansas-Texas R.R. Co.* v. *Shelton*, 383 S.W.2d 842, 846 (Tex. Civ. App. 1964). The courts that support petitioner's position have done so through a flawed interpretation of FELA's purposes, a failure to properly consider the statutory text, and the mistaken belief that different causation standards would make the jury's job in weighing comparative fault difficult. *See, e.g., Page*, 349 F.2d at 824.

Petitioner asserts that calculating proportional fault using unequal causation standards is illogical. *See* Pet. 10-12. But petitioner is fundamentally mistaken about the role of causation in a system of comparative fault. As one commentator observed, "the sole function of a legal cause standard in this comparative negligence system is to signify when a comparison is to be made . . . . Once the legal cause test indicates that a comparison is to be made, its function in the comparative negligence system is over." Charles H. Traeger, III, *Legal Cause, Proximate Cause, and Comparative Negligence in the FELA*, 18 Stan. L. Rev. 929, 935 (1966).

Rather than creating two incommensurate scales that make the comparison of fault impossible, the different causation standards simply act as gatekeepers, or thresholds, that determine which acts or omissions can be included in the computation of fault. Having two gatekeepers presents no insurmountable problems of workability or logic: Although the universe of acts or omissions is larger for the defendant than for the plaintiff, once the boundaries are drawn, the plaintiff's and defendant's acts or omissions that have now been made part of the equation are weighed just as they would be in any other analysis of comparative fault. As petitioner itself puts it: "[F]ault, not causation, is the relevant metric for apportioning financial responsibility." Pet. 11. Indeed, causation drops out of the equation once its gatekeeping function has been served: The jury then compares the defendant's negligence to the plaintiff's negligence, which are judged by the same standards, and

reduces the plaintiff's award by "diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff." Pet. App. 35a (MAI 8.02); Legal File 26.[3]

### C. The Missouri Court of Appeals Did Not Use Its Jury Instructions to Defeat Substantive Federal Rights.

Petitioner argues that the Missouri Court of Appeals' reliance on its model jury instructions, the Missouri Approved Instructions, defeats federal rights and conflicts with *St. Louis S.W. Ry. Co.* v. *Dickerson*, 470 U.S. 409 (1985). *See* Pet. 15. However, unlike in *Dickerson*, the causation MAIs reflect Missouri's interpretation of federal, not state, law. In *Dickerson*, the Missouri Court of Appeals refused to stray from an MAI that did not provide for a jury instruction on the present value of future damages, noting that

> [t]he Missouri Supreme Court has held that ". . . a present value instruction was not appropriate under MAI." *Bair v. St. Louis-Francisco Ry. Co.*, 647 S.W.2d 507, 510 (Mo. banc 1983); but cf. *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485 . . . (1916) (on writ of error to the Court of Appeals of Kentucky, the U.S. Supreme Court reversed and remanded the case because of the trial court's refusal to give a requested present value instruction). The point is denied.

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[3] The definitions of plaintiff's and defendant's negligence are identical in the MAIs used at trial. *See* MAI 37.07(B) n.1 (West 2002); MAI 24.01 n.4 (West 2002); MAI 11.07 ("The term 'negligent' or 'negligence' as used in this [these] instruction[s] means the failure to use ordinary care."); *see* Trial Tr. 572 (reflecting the trial court's approval of a negligence instruction based on MAI 11.07).

*Dickerson* v. *St. Louis S.W. Ry. Co.*, 674 S.W.2d 165, 169-70 (Mo. Ct. App. 1984) (emphasis added). Because the Missouri court refused to follow *Kelly*, this Court held that the decision constituted denial of a federal right under FELA. *Dickerson*, 470 U.S. at 411-12.

Here, unlike in *Dickerson*, the Missouri court did not apply its MAI in conscious disregard of a federal right. Instead, it applied jury instructions embodying its views (and those of the Missouri Supreme Court) on the correct interpretation of FELA. There was no need to "look beyond the face" of the MAI, *see* Pet. 15, because the MAI was a facially correct interpretation of federal law. As the Missouri courts have often recognized, the propriety of various jury instructions in FELA cases presents an issue of substantive *federal* law. *See, e.g., Kauzlarich* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 910 S.W.2d 254, 258 (Mo. 1995); *Hawkes* v. *Norfolk & W. Ry.*, 876 S.W.2d 705, 706 (Mo. Ct. App. 1994).[4]

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[4] In an attempt to make its first question presented seem more significant, petitioner tars St. Louis, Missouri as "pro-plaintiff," Pet. 16, and claims that "[t]his case illustrates forum shopping at its worst." Pet. 17. But petitioner's misplaced invective cannot undermine the plain language of FELA, which provides a liberal venue provision. *See* 45 U.S.C. § 56; *see also Baltimore & O. R. Co. v. Kepner*, 314 U.S. 44, 53-54 (1941) ("The privilege was granted because the general venue provisions worked injustices to employees."); *Boyd v. Grand Trunk Western R. Co*, 338 U.S. 263, 266 (1949). Sorrell's choice of venue was particularly understandable given that his principal witnesses and Norfolk Southern headquarters for the division to which he was assigned were all located in St. Louis, and the railroad's key witness, Keith Woodin, resided in the state of Missouri.

## II. The Second Question Presented Was Not Preserved for Review Nor Does It Otherwise Merit Review.

### A. Petitioner Did Not Present Its Second Question to the Missouri Supreme Court.

The railroad argues that the Missouri Court of Appeals' refusal to require the trial court to use a special verdict form violates FELA and discriminates against federal rights. Pet. 17-22. In its opening brief to that court, the railroad argued that a special verdict form was required by FELA and the Constitution, *see* Norfolk Southern Appellant Br. 64-75, and the court rejected the argument. Pet. 17a-18a. The railroad, however, omitted this issue from its Application for Transfer to the Missouri Supreme Court, filed in the Missouri Supreme Court. Because of this omission, the Court should deny review of the second question presented.

"[W]hen the highest state court fails or refuses to pass expressly upon a federal question, the party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation." Stern, Gressman, et al., *Supreme Court Practice* 175 (8th ed. 2002); *see Street* v. *New York*, 394 U.S. 576, 582 (1969). Because "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider," this "rule affords state courts an opportunity to consider" the questions presented in the first instance. *Adams* v. *Robertson*, 520 U.S. 83, 90 (1997) (internal citation omitted); *see also id.* (state's highest court "has an undeniable interest in having the opportunity in this case to determine in the first instance whether its existing rules governing class-action[s] satisfy the requirements of due process"). The Missouri Supreme Court did not have that opportunity and, accordingly, this Court should deny review. That conclusion follows regardless of whether the Court treats the requirement as prudential or jurisdictional.

*Id.*; *see also Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992).

**B. Neither FELA Nor the Constitution Requires Special Verdict Forms.**

Even if petitioner's challenge to Missouri's general verdict form in FELA cases were preserved, it does not deserve further review. Petitioner asserts that the general verdict form used in Missouri FELA trials renders post-trial review of the verdicts "impossible," violating the railroad's right to a "proper allocation of damages" under FELA. Pet. 19. Petitioner argues that FELA trial courts must "superintend the jury's decisionmaking," *id.*, and that Missouri's use of general jury verdict forms for FELA cases—but not for state-law tort cases—constitutes discrimination against a federal right. Pet. 19, 21-22. In light of petitioner's failure to identify any cases from this Court, lower federal courts, or state courts supporting its contention that FELA requires special jury verdicts, this Court should deny review of this question.

Petitioner cites several lower federal court decisions to illustrate a purported majority rule requiring special verdicts. *See* Pet. 20 (citing *Blue* v. *W. Ry. of Ala.*, 469 F.2d 487 (5th Cir. 1972); *Koivunen* v. *States Line*, 371 F.2d 781 (9th Cir. 1967); *Flener* v. *Louisville & Nashville Ry.*, 198 F.2d 77 (7th Cir. 1952); *Wetherbee* v. *Elgin, Joliet & E. R. Co.*, 191 F.2d 302 (7th Cir. 1951)). These decisions are inapposite. Rather than finding a statutory or constitutional right to a special verdict form, they merely comment that a special verdict issued under Federal Rule of Civil Procedure 49 would have avoided the need for reversal and remand in some of the cases or potentially unnecessary appeals in others. For example, when an appeals court determined that there was insufficient evidence for a contributory negligence jury instruction, the general verdict did not allow it to determine how much the jury might have reduced the award in error. *See Koivunen*, 371 F.2d at 783. None of the cases embraces

the broad view petitioners advance—that trial courts are required "to superintend" FELA jury deliberations through special verdicts. *See* Pet. 19.

Nor does the Constitution require the use of special jury verdicts. Petitioner's underlying theory is that FELA defendants have a right to intrude into jury deliberations to ensure that the jury is properly applying the law. However, there is no such right to monitor a jury's deliberations, and petitioner offers no basis for concluding that FELA cases necessitate greater monitoring of jury deliberations than any other kind of case. To the contrary, jurors in all cases are presumed to follow their instructions. *See Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 443 (1994).

Petitioner again argues that the Missouri Court of Appeals frustrated federal rights under FELA in refusing to require a special verdict form. Pet. 20. But the Court of Appeals simply reasoned that the railroad had not presented persuasive statutory or constitutional argument to support its views. *See* Pet. Ap. 17a-18a. The appeals court also cited *Giddens* v. *Kansas City S. Ry. Co.*, 29 S.W.3d 813, 824 (Mo. 2000), in which the Missouri Supreme Court specifically rejected a railroad's argument that Missouri was discriminating against negligence actions under FELA when the railroad was "simply objecting to how Missouri allows the jury to record its damage verdict in such cases, not to law governing the standards under which such damages may be awarded." *Id.* Rather than spurn federal rights, the Missouri Court of Appeals decided that the MAIs were in harmony with them.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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